LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 18 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 122.

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION OF FRANK PALERMO FOR REHEARING.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 122.

FRANK PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION OF FRANK PALERMO FOR REHEARING.

Petitioner, Frank Palermo, prays that this Court grant a rehearing of its Order entered on June 1, 1964, denying the Petition for a Writ of Certiorari in this case, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit, prayed for in the petition filed on May 10, 1963 (as of October Term, 1962, No. 1090), herein.

1. In the instant case, the record discloses that the district court denied an offer of proof that Negroes were excluded from the jury (R. T. 75-89). This was a ground relied on in the Petition for a Writ of Certiorari filed, at No. 145, by Truman Gibson (Gibson Petition, pp. 21-22), and adopted by Petitioner herein (Palermo Petition, p. 11).

On May 4, 1964, this Court determined, in *Coleman v. Alabama*, — U. S. —, 12 L. Ed. 2d 190, 84 S. Ct. —, that the defendant therein was entitled to prove his allegations as to exclusion of Negroes from jury service.

This Court has spoken with great force on the need to have the federal jury system comport with the democratic ideal. *Ballard v. United States*, 329 U. S. 187 (1947); *Thiel v. Southern Pacific Co.*, 328 U. S. 217 (1946). The opinion of the Court in *Ballard* declared that "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." 329 U. S., at 195. So strongly has this Court held to the vital necessity to preserve the integrity of the federal jury system that it has expressly held defects to be reversible error without any showing of other special prejudice or harm to the parties in a specific case. The fact, therefore, that petitioner is not a Negro is immaterial.

The court below, in this case, held that "There was no proof of exclusion" (Pet., App. A, p. 49a). But the offer in the district court was to show exclusion by race from jury service, and petitioner, who joined in the motion (R. T. 80), was denied the opportunity to adduce such evidence.[1] Accordingly, as in *Coleman v. Alabama, supra*, petitioner is "now entitled to have his day in court on his allegations." 12 L. Ed. 2d, at 1963.

Petitioner respectfully submits that the issue here presented is substantial, in the public interest, and is controlled by this Court's recently announced decision in *Coleman v. Alabama, supra.*

2. Further, substantial grounds for rehearing rest upon the recent decision of this Court in *Massiah v. United*

1. Here, unlike *Coleman v. Alabama*, the point at issue was preserved at all stages of the proceeding. The Court of Appeals in declaring that there was no proof of exclusion overlooked the district court's refusal to receive the proof offered.

States, — U. S. — (May 18, 1964). In that case it was held that the petitioner's rights under the Fifth and Sixth Amendments were violated by the use of statements elicited from the petitioner in the absence of his counsel.

(a) In the instant case, the record shows that petitioner, on May 6, 1959, had been arrested by a Los Angeles police officer at about 11:00 o'clock P. M. assertedly for pilfering from a newsstand. He was taken to a police station and not "booked" until 3:55 o'clock A. M. the next day or nearly 5:00 o'clock A. M., according to petitioner). He was released on bail on the afternoon of May 7. During this period he was questioned by a Los Angeles Police Officer concerning matters which became the subject of the instant indictment. Although petitioner requested counsel, he was not permitted to contact any during the interrogation. A motion to suppress, on which the above evidence was taken, was denied, and on cross-examination of the petitioner, the Government, over objection, was permitted to use a part of the illegal interrogation of the Los Angeles police for the purpose of contradicting the petitioner (R. T. 6212-6218).

(b) In addition petitioner adverts to the arrangements between the Los Angeles police and the witness Jackie Leonard for the intereception of telephone conversations between the petitioner and Leonard.

In both situations, in the light of *Massiah*, petitioner's rights under the Fifth and Sixth Amendments were infringed.

3. The use in evidence of recorded telephone conversations obtained with the consent of only one of the parties to the conversation continues to be a matter of large practical importance in the application of 47 U. S. C. § 605 and to the administration of justice. The view adopted by the

court below, identifying the situation presented with *Rathbun v. United States*, 355 U. S. 107, see also *Broadus v. United States*, 317 F. 2d 212, 213-214 (5th Cir. 1963), appears to be in conflict with the definition of "sender" adopted in *United States v. Tane*, 329 F. 2d 848 (2d Cir. 1964).

Although this Court had granted certiorari in *Ferguson v. United States*, 307 F. 2d 787 (certiorari granted June 10, 1963), review was not had because on the motion of the United States, remand was granted on January 6, 1964, — U. S. —, 11 L. Ed. 2d 413. It is submitted that the reasons which constrained this Court to grant certiorari in that case remain here.

WHEREFORE, your Petitioner prays that this Court grant rehearing of its Order denying the Petition for a Writ of Certiorari, and that the Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

Certificate of Counsel.

I certify that this Petition is presented in good faith and not for delay and is restricted to substantial grounds available to petitioner not previously presented and to intervening circumstances of substantial or controlling effect.

JACOB KOSSMAN.

June, 1964.